EDITOR'S NOTE

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(3)

NO. 84-6807

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MILLIE R. LEE, PETITIONER,

VS.

THE STATE OF ILLINOIS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

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APP

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Millie R. Lee, respectfully petitions This Honorable Court to issue a writ of certiorari to the Appellate Court of Illinois, Fifth Judicial District.

(a)

QUESTION PRESENTED FOR REVIEW

This petition for a writ of certiorari presents the question of whether the petitioner's sixth and fourteenth amendment right to confront the witnesses against her was violated by the trial court's consideration of the inculpatory confession of her co-defendant as substantive evidence of her guilt.

(b)

LIST OF ALL PARTIES TO PROCEEDINGS IN THE APPELLATE COURT

The above caption to the case contains the names of all the parties.

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(d)

REFERENCE TO REPORTS OF OPINIONS

The decision of the Appellate Court of Illinois, Fifth Judicial District, was filed on December 7, 1984, People v. Millie R. Lee, (5th Dist. No. 5-82-539, Rule 23 Order filed December 7, 1984), and appears as Appendix A to this petition. The order of the Supreme Court of Illinois denying her petition for leave to appeal was filed on April 2, 1985, People v. Millie R. Lee, Docket No. 61304, and appears as Appendix B to this petition.

(e)

JURISDICTION OF THE

UNITED STATES SUPREME COURT

Jurisdiction of This Honorable Court is invoked under the provisions of 28 U.S.C. §1257(3). This petition is being filed within sixty days of the decision of the Supreme Court of Illinois which refused a timely request that it review the decision of the Appellate Court of Illinois which affirmed the petitioner's conviction.

(f)

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

* * *

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

(g)

STATEMENT OF THE CASE

On April 16, 1982, a bill of indictment was returned by the grand jury of St. Clair County, Illinois, charging the petitioner and her co-defendant, Edwin Thomas, with the murders of Mattie Darden and Odessa Harris. (R.C13-14) On June 1, 1982 the petitioner waived trial by jury. (R.C51-56) Petitioner and Edwin Thomas were jointly tried before the bench in the St. Clair County Circuit Court on July 7-8, 1982.

On February 13, 1982, Lily May Williams resided in Apartment 35C in the Roosevelt Homes, East St. Louis, Illinois. (R.11) Sometime during the late evening she discovered and extinguished a fire in the closet of the next door apartment (35B). (R.12-13) East St. Louis Fireman Lavester Heavens, who had responded to the report of the fire, discovered a body upside down in the closet of apartment 35B. He also discovered a can of charcoal lighter fluid on the floor by the closet. (R.13-16) The body had been burned and had a number of stab wounds. (R.19-21)

On the morning of February 14, 1982 East St. Louis Police Detective Sandra Muckensturm spoke with James Trione, the owner of the Bunkum Liquor Store directly across the street from the Roosevelt Homes. (R.25) Mr. Trione informed the police that he had sold a can of Gulf charcoal lighter fluid on February 11, 1982, late in the evening, to an individual named "Renee". Trione identified petitioner at trial as "Renee". (R.55-59) Additionally, a purse was found by police officer James Detloff approximately one hundred feet south of apartment 35B. Inside the purse was the identification of Odessa Donahue. (R.26, 140,166) Police began a search for Odessa Donahue. (R.166-67) Their investigation led them to the petitioner's apartment, apartment 33B in the Roosevelt Homes. (R.167-70)

On February 15, 1982 East St. Louis Police Detective Sergeant L. C. Moore, Sergeant Ezell, and Detective Brinkley went

to the petitioner's apartment. (R.100,170) They were invited into the apartment and noticed that the apartment was in a shambles. Furniture had been moved around, walls had been painted, and a mop and a bucket were visible. (R.102,173) The petitioner informed the police that she did not know the whereabouts of Odessa Donahue, also known as Odessa Harris. (R.102,172) The petitioner stated that the apartment was her auht Mattie Darden's, who was out of town visiting relatives. Petitioner also stated that she was related to Odessa (Donahue) Harris by marriage. (R.103,172) The petitioner agreed to go to the East St. Louis Police Department in order to determine whether she could identify the body discovered in the closet. (R.103,174)

At the East St. Louis Police Department the petitioner was shown several photographs of the body. Detective Brinkley had been informed that the body found in the closet was not that of Odessa Harris. (R.107-08,188-89,175) Detective Brinkley observed that the petitioner was crying while she was viewing the photographs of the body. He advised petitioner of her rights under Miranda. (R.104,175)

The petitioner gave a number of conflicting accounts concerning the whereabouts of Odessa Harris and Mattie Darden. (R.106,178) The petitioner eventually admitted that the body in the closet was that of Mattie Darden and that Odessa Harris was also dead. She admitted that she was involved in the death of Mattie Darden, that Edwin Thomas also was involved, and that Edwin Thomas killed Odessa Harris. (R.109,179) The police placed the petitioner under arrest, read the petitioner her Miranda rights again, and called Detective Muckensturm to take a written statement from the petitioner. (R.179-80)

Detective Muckensturm advised petitioner of her rights under Miranda and began taking a statement from petitioner approximately 8:40 p.m. on February 14, 1982. (R.28) Later, on February 17, 1982, East St. Louis Police Officer Lenzie Stewart took a written statement from petitioner which corrected some errors in her previous statement. (R.194-99)

Petitioner's statements related that on Thursday, February 11, 1982, she was with her boyfriend (Edwin Thomas) at the apartment which she shared with her aunt Mattie Darden. Mattie Darden returned to the apartment with Odessa Harris. At one point the petitioner was in the kitchen having an argument with Odessa Harris. Mattie Darden was in her bedroom. As Odessa Harris left the kitchen and went into the living room, Edwin Thomas stabbed Odessa Harris. Odessa Harris called for help. The petitioner ran into her aunt's bedroom. Her aunt was in the bedroom with a knife and swung the knife at the petitioner. The petitioner ran back into the kitchen, got a knife, and went into the bedroom where she stabbed her aunt a number of times. Mattie Darden was lying on the floor alive. The petitioner obtained an iron skillet from Edwin Thomas and hit Mattie Darden on the head a couple of times, at which point the skillet broke. Edwin Thomas obtained another skillet and the petitioner again hit Mattie Darden with the skillet. Edwin Thomas stated that she was not hitting Mattie Darden hard enough. He took the skillet and hit Mattie Darden on the head. They then put Odessa Harris' body in a trunk and put the trunk in an alley behind the apartment. They carried Mattie Darden's body wrapped in a couple of blankets to apartment 358 and placed the body in the living room closet.

The petitioner then went to the Bunkum Road Liquor Store and purchased a can of lighter fluid. Approximately midnight, Edwin Thomas poured lighter fluid on the body of Odessa Harris and set it on fire. They then began cleaning up the apartment. The next day they checked the trunk and discovered that the upper part of Odessa Harris' body had not completely burned. They placed most of the remains in a cardboard box which they set out with the trash. On Saturday, February 13, 1982, approximately 10:00 p.m., Edwin Thomas went back to apartment 358 to burn the body of Mattie Darden. Edwin Thomas took the can of lighter fluid with him. Mr. Thomas returned to the apartment and told her he had set the body on fire, but that someone may have called the fire department and the police. (See Supplement to the record, statement of Millie Lee)

Edwin Thomas was arrested and advised of his rights under Miranda by Detective Walker and Detective Sergeant Moore. (R.91-96,110-12) Eventually Mr. Thomas gave a written statement. (R.113-15,135) Mr. Thomas' written statement essentially followed the statement of the petitioner. However, Mr. Thomas' statement additionally related that the petitioner and he had discussed on prior occasions killing Mattie Darden due to severe personality conflicts between the petitioner, Edwin Thomas, and Mattie Darden. Mr. Thomas' statement also detailed that they discussed killing Mattie Darden the evening of February 11, 1982, but that they wanted Odessa Harris to leave. Odessa Harris did not leave and they were forced to kill her also. Mr. Thomas related that he had the petitioner lure Odessa Harris into the kitchen and he attacked Odessa Harris with a knife. He stabbed her a number of times on the floor of the kitchen, eventually killing her. The petitioner then went into her aunt's bedroom and stabbed Mattie Darden. They then disposed of the bodies as the petitioner had described in her statement. (See supplement to the record, statement of Edwin Thomas)

The police searched the petitioner's apartment with her consent. Detective Brinkley and Alva Busch went to the petitioner's apartment and obtained some charred human bones and a broken skillet from the trash can behind the apartment. (R.78-82,181) They also located the knives which were used in the attacks. (R.183)

An autopsy determined that Mattie Darden died due to multiple stab wounds to the chest as well as blunt trauma to the head. (R.77)

Dr. William A. Murphy, a specialist in radiology, examined the charred human bone fragments and took x-rays of them. He compared those x-rays to x-rays taken from the medical file of Odessa (Donahue) Harris. (R.143-49,153) From his comparison of the x-rays he was able to determine that the bone fragments were those of Odessa (Donahue) Harris. (R.153-57)

It was determined that Edwin Thomas' left thumbprint was on the can of Gulf charcoal lighter fluid discovered in apartment 35B. (R.160-62)

The trial court found both petitioner and Edwin Thomas guilty of the murders of Odessa Harris and Mattie Darden. (R.239) The trial court, sitting as the trier of fact, stated in rejecting the defense arguments:

> As to the contention of the defendant, particularly the defendant Lee as stated by her attorney, that Voluntary Manslaughter which is [sic] resulted from a sudden and intense passion, that is disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant [Edwin Thomas] took a knife, took it back to the chair where he kept it, and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could [sic] come out. Now that isn't sudden and intense passion. There was no self-defense that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, and expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. (R.238)

On September 7, 1982, the petitioner was sentenced for the murder of Odessa Harris to a term of forty years incarceration. (R.C73) For the murder of Mattie Darden the petitioner was sentenced to a term of natural life imprisonment. (R.C74) Timely notice of appeal to the Appellate Court of Illinois, Fifth Judicial District, was filed on September 8, 1982. (R.C80)

On appeal to the Appellate Court of Illinois petitioner contended, inter alia, that her sixth and fourteenth amendment right to confront the witnesses against her was violated by the trial court's consideration of Mr. Thomas' confession against her. On December 7, 1984, the Appellate Court of Illinois, Fifth Judicial District, in an unpublished order rejected her argument. Petitioner filed a timely petition for leave to appeal to the Supreme Court of Illinois, and it was denied on April 2, 1985.

REASON FOR GRANTING THE WRIT

THIS HONORABLE COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE DECISION OF THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT, IS IN CONFLICT WITH THIS COURT'S DECISIONS IN BRUTON V. UNITED STATES AND PARKER V. RANDOLPH BECAUSE THE TRIAL COURT CONSIDERED THE CO-DEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE OF PETITIONER'S GUILT, A VIOLATION OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HER.

Among the paramount rights afforded by the Constitution of the United States is the right of an accused to require that the accusers appear before the trier of fact and subject those accusations to cross-examination. The Sixth Amendment of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him... .

U.S. Const. amend. VI. This Honorable Court held in Pointer v. Texas, 380 U.S. 400 (1965) that the sixth amendment right to confront the witnesses against a defendant is applicable to the States through the fourteenth amendment. The denial of this right "calls into question the ultimate 'integrity of the fact-finding process'". Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

In Bruton v. United States, 391 U.S. 123 (1968) This Honorable Court held that the right of confrontation includes the right of cross-examination and is violated at a joint jury trial when a co-defendant's confession inculpating the defendant is admitted into evidence and the co-defendant does not testify. In Bruton Your Honors established that there is too great a danger that the jury could not follow the instructions of the court not to consider a co-defendant's confession against the defendant. The rule had previously been that a proper jury instruction which limited the use of the co-defendant's confession strictly against

the co-defendant was proper.[1] 391 U.S. at 135-36; See Delli Paoli v. United States, 352 U.S. 232 (1957).

While this case was tried before the bench and not a jury, the petitioner's sixth and fourteenth amendment right of confrontation was violated, since the trial court considered the most inculpatory parts of co-defendant Edwin Thomas' confession against her. In pronouncing petitioner guilty of both murders, the trial court, sitting as the trier of fact, stated:

> As to the contention of the defendant, particularly the defendant Lee as stated by her attorney, that Voluntary Manslaughter which is [sic] resulted from a sudden and intense passions, that is disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking, as stated by Mr. Hudlin, she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant [Edwin Thomas] took a knife, took it back to the chair where he kept it, and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could [sic] come out. Now that isn't sudden and intense passion. There was no self-defense that even entered into a struggle between the defendant Lee and her aunt in the bedroom. She went in there, and expected the aunt to have a gun, the aunt didn't. She had a knife, however. And she stabbed her, then they both acted together. (R.238) (emphasis added)

Mr. Thomas did not testify at their joint trial and petitioner was therefore not able to subject Mr. Thomas' accusations to cross-examination.

The Appellate Court of Illinois, Fifth Judicial District, agreed that the trial court considered Mr. Thomas' confession against the petitioner (Order at 5), however The Court rejected petitioner's contention that her sixth and fourteenth amendment [illegible] (Order at 6) The Court stated:

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[1] For Illinois' limiting instruction see I.P.I.-Criminal 2d No. 3.08.

> It is well settled that a substantial difference exists between the Bruton rule and the interlocking confession situation. In the former situation, a jury hears only the co-defendant's statement incriminating the defendant who has himself made no admissions whatsoever, whereas in the latter situation, the jury hears a co-defendant's statement incriminating the defendant who had himself made similar inculpatory admissions. When the interlocking admissions are inculpatory, the admission of co-defendant's incriminating statement against defendant does not fall within the Bruton rule. Hence defendant's first argument fails. People v. Bassett (1974), 56 Ill. 2d 285, 307 N.E.2d 359, 365; People v. Rosochaki (1969), 41 Ill. 2d 483, 244 N.E.2d 136, 141-42. (Order at 6)

The Appellate Court of Illinois' reliance upon Bassett and Rosochacki is a fundamental misapplication of the law. In People v. Rosochaki, 41 Ill. 2d 483, 244 N.E.2d 136 (1969), the Illinois Supreme Court held that where a nontestifying co-defendant's extrajudicial statement is admitted as evidence of the declarant's guilt at a joint trial in violation of the Bruton rule, the prejudice inherent in such evidence is diminished if the defendant has himself made a similar statement. For this reason, admission of a nontestifying co-defendant's interlocking confession can under some circumstances be harmless error. This was the position of Justices Stevens, Brennan, Marshall and Blackmun in Parker v. Randolph, 442 U.S. 62 (1979). In People v. Bassett, 56 Ill. 2d 285, 307 N.E.2d 359 (1974), the Illinois Supreme Court apparently adopted sub silentio the position that "interlocking confessions" do not fall within the Bruton rule. This was the position taken by Justices Rehnquist, Stewart, White and Chief Justice Burger in Parker.

In Parker This Honorable Court reviewed the order of the District Court granting habeas corpus relief to three nontestifying co-defendants who had made interlocking confessions which were admitted at their joint trial. Chief Justice Burger and Justices Rehnquist, Stewart, and White expressed the view that the admission of interlocking confessions of nontestifying co-defendants with proper limiting instructions conforms to the requirements of the sixth and fourteenth amendments. Justice Rehnquist, speaking for the four justices reasoned that:

> The right protected by Bruton -- the "constitutional right of cross-examination," id., at 137 -- has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. Successfully impeaching a co-defendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged.

Parker v. Randolph, 442 U.S. at 73 (emphasis added).

Justice Blackmun concurred in the results reached in the plurality opinion but disagreed with the view that there was per se no violation of the sixth amendment right of confrontation when the defendant has made a statement similar to that of his non-testifying co-defendant. Justice Blackmun expressed the view that admission of the nontestifying co-defendant's statement was error, that the degree of prejudice inherent in the error should be examined on a case-by-case basis, and that reversal was not required where the error was harmless beyond a reasonable doubt, as in Parker. Parker v. Randolph, 442 U.S. at 77-81.

Justice Stevens writing for the three dissenting justices reasoned that the plurality incorrectly assumed "that all unchallenged confessions by a defendant are equally reliable". Parker v. Randolph, 442 U.S. at 84. Justice Stevens pointed out that in some cases the defendant's inculpatory statement may be ambiguous, incomplete or the result of coercive influences and thus not sufficiently convincing to negate prejudice inherent in violating his constitutional right to cross-examine his co-defendant. Parker v. Randolph, 442 U.S. at 84-86.

That the petitioner was tried by the court merely compounds the error in this case as the Illinois Supreme Court stated in People v. Reichert, 352 Ill. 358, 185 N.E. 585, 586 (1933), "[c]ourts have no more right than a jury to convict the accused on incompetent evidence." In United States v. Longee, 603 F.2d 1342 (1979) the Ninth Circuit Court of Appeals held that a Bruton problem may be reversible error in a trial before the bench. The court in Longee stated:

> The fact that the defendants were tried to the court rather than to a jury does not eliminate the error. The disregard of

> incriminating evidence as against only one defendant in a joint trial has been termed "a mental gymnastic which is beyond, not only [the jury's] powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (L. Hand, J.), quoted in Bruton, 391 U.S. at 132 n.8, 88 S.Ct. at 1626. It is for this reason that the use of a limiting instruction in a jury trial is inadequate to cure the error. Bruton, 391 U.S. at 135-37, 88 S.Ct. at 1627-29. Here, there was neither an objection by defense counsel nor an indication in the record that the district judge attempted to disregard Chaser's statements as evidence against Longee. Indeed, he specifically referred to them in his findings.

603 F.2d at 1345.

While petitioner's and Mr. Thomas' statements contain many similarities, crucial differences do exist which do not make the statements "interlocking confessions". Those crucial differences are the points relied upon by the trial court in rejecting petitioner's defense at trial. Petitioner's statements are not a confession to murder.[2] Mr. Thomas' statements are a confession to two murders.

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[2]The Illinois murder statute states:

> A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another, or
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another, or
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter.

Ill. Rev. Stat., 1983, Ch. 38, §9-1(a).

The petitioner's defense at trial was that she was not accountable for the death of Odessa Harris.[3] (R.232-34) Petitioner's statements to the police only indicated that co-defendant Thomas stabbed Odessa Harris to death. Petitioner's statement did not indicate a prior plan to murder Odessa Harris, nor did it indicate prior knowledge that Mr. Thomas would stab Odessa Harris. Petitioner also argued at trial that the killing of Mattie Darden could only be considered

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[3]The Illinois accountability statute states:

> A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both.

Ill. Rev. Stat., 1983, Ch. 38, §5-1. Section 5-2 states:

> A person is legally accountable for the conduct of another when:
>
> (a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or
>
> (b) The statute defining the offense makes him so accountable; or
>
> (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempt to aid, such other person in the planning or commission of the offense....

Ill. Rev. Stat., 1983, Ch. 38, §5-2.

voluntary manslaughter[4] due to either an unreasonable belief in self-defense, or her intense and sudden passion, since when she ran into Mattie Darden's bedroom she was confronted by Mattie Darden with a knife. The petitioner then ran out and obtained a knife which she used to stab Mattie Darden.

The trial court rejected petitioner's defenses based on Mr. Thomas' confession. The petitioner's and Mr. Thomas' statements are not "interlocking" in the crucial area of knowledge and intent. Petitioner was therefore severely prejudiced by the trial court's use of Mr. Thomas' confession.

The reasoning of the Appellate Court fails when it states:

> Although the judge did consider co-defendant Thomas' confession, it is evident from the record that he considered the defendant's confession as well. Defendant's statement reveals her attack on Darden was not the result of self-defense, for after she had left Darden's bedroom originally there was no need for her to return to the bedroom. Furthermore, defendant alluded to a plan in her own confession, where she stated:

---

[4]The Illinois voluntary manslaughter statute states:

> A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed, or
>
> (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.
>
> Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.
>
> (b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, [illegible] the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

Ill. Rev. Stat., 1983, Ch. 38, §9-2

> Lee: Me, and Edwin [sic] had talked about stopping aunt Mattie from harrassing me before.* * *

(Order at 5). The Court incorrectly assumed that this showed a plan on the part of petitioner to murder Mattie Darden. Petitioner's statement does not show an intent to kill, nor a plan to murder Mattie Darden. The Court ignored the continuation of petitioner's statement when she told the police:

> Edwin used to get mad when my aunt would talk about me and that he couldn't take much more of what my auntie was doing, that [sic] when he began talking about doing something to aunt Beetty [sic], but he never said what.

(Supplement to the record, Statement of Millie Lee, 10-11) (emphasis added) No prior plan between petitioner and Mr. Thomas can be found in petitioner's statement.

Justice Stevens' concern in Parker that the defendant's statement may be ambiguous or incomplete is present in this case. Petitioner's statement is incomplete in that it is not a confession to murder; it demonstrates no intent to kill or premeditation on her part. It is incomplete in that the trial court had to utilize co-defendant Thomas' confession to impute to petitioner such an intent to kill and such a prior plan to commit murder. On the other hand, Justice Rehnquist's theory of harmlessness is not present. Contrary to his assertion in Parker that cross-examination and impeachment of the co-defendant's statement would "likely yield small advantage to the defendant", impeachment of Mr. Thomas' confession as to the existence of a plan and intention to kill would reap great dividends for the petitioner here. And, it must be remembered that it was only through co-defendant Thomas' confession that these factors were established. The trial court's error in considering Mr. Thomas' confession against petitioner cannot be harmless error under Parker.

This Honorable Court in Bruton was concerned that:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . .Such a context is presented

> here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the confrontation clause was directed.

391 U.S. at 135-36.

In this case we do not have just the danger that the trier of fact will not follow the law as in Bruton, but the trial court's own statement that it was not following the law. Consequently, constitutional error was committed by the trial court and the Appellate Court of Illinois sanctioned such error.

CONCLUSION

The petitioner's right to confront the witnesses against her was violated by the court's consideration against her of the more inculpatory portions of her nontestifying co-defendant's confession. This Honorable Court's decisions in Bruton v. United States and Parker v. Randolph demonstrate that the Appellate Court of Illinois, Fifth Judicial District, erroneously determined that no sixth and fourteenth amendment violation occurred. Therefore the petitioner prays that This Honorable Court issue a writ of certiorari the Appellate Court of Illinois, Fifth Judicial District, reverse the decision of that court and the Circuit Court of St. Clair County, and grant the petitioner a new trial.

Respectfully submitted,

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